

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-3068

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

RICHARD A. ENGELBRECHT,

PLAINTIFF-RESPONDENT,

V.

GARY J. SIMON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
WILLIAM M. ATKINSON, Judge. *Reversed and cause remanded for further
proceedings.*

CANE, P.J. Gary Simon appeals from the trial court's order dismissing his demand for a new trial after receiving an adverse decision from the Brown County Court Commissioner. The sole issue on appeal is whether Simon's demand for a new trial was ineffective because he had it personally delivered to the office of the plaintiff, Richard Engelbrecht, rather than mailing it as prescribed

in the statute. Because Engelbrecht's receiving notice of Simon's demand for a new trial by personal delivery rather than by mail constitutes harmless error, the order is reversed and the matter is remanded for further proceedings.

This dispute arose from attorney Engelbrecht's small claims action for attorney fees against Simon. Initially, the court commissioner heard the disputed claim and rendered a decision in favor of Engelbrecht for \$2,572 plus disbursements. Simon timely filed a written demand for a new trial and paid the required jury fee.¹ However, instead of mailing the notice of his election for a new

¹ Section 799.207, STATS., provides in part:

Proceedings before court commissioner.

....

(2) The court commissioner's decision shall become a judgment 11 days after rendering, if oral, and 16 days after mailing, if written, except that:

(a) Default judgments will have immediate effect.

(b) Either party may file a demand for trial within 10 days from the date of an oral decision or 15 days from the date of mailing of a written decision to prevent the entry of the judgment.

(3) (a) There is an absolute right to have the matter heard before the court if the requirements of this section are complied with.

(b) The court commissioner shall give each of the parties a form and instructions which shall be used for giving notice of an election to have the matter heard by the court.

(c) *The demand for trial must be filed with the court and mailed to the other parties within 10 days from the date of an oral decision or 15 days from the date of mailing of a written decision. Mailing of the notice and proof of such mailing is the responsibility of the party seeking review.*

(d) Notice of a demand for trial may also be given in writing and filed by either of the parties at the time of an oral decision.

(4) Following the timely filing of a demand for trial, the court shall mail a trial date to all of the parties.

(continued)

trial to Engelbrecht, Simon had a friend personally deliver the notice to Engelbrecht's office. Although Engelbrecht became aware of Simon's demand for a new trial, he moved the court to dismiss the demand because he had not received the notice by mail.

The trial court concluded that § 799.207(3)(c), STATS., requires that notice be by mail only. It reasoned that where a specified mode of giving notice is prescribed by statute, that method is exclusive. Consequently, it held that Simon's failure to follow the statutory language requiring notice be given by mail was fatal and, therefore, denied the demand for a new trial.

Simon argues that § 805.18, STATS., applies and this court agrees. This statute provides in part: "(1) The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party."

It is undisputed that Simon timely filed his demand for a new trial. The purpose of the notice is to notify the adverse party that the court commissioner's decision has been appealed and a new trial will be held before the circuit court. *See* § 799.207(3)(c), STATS. Here, Engelbrecht received notice of this fact within the required time and has not been prejudiced by failure to receive the notice by mail. Although Engelbrecht claims that his secretary never received the notice, the evidence is uncontradicted that a timely notice of the demand was left with his secretary. This court fails to see how any of Engelbrecht's substantial rights were affected.

(5) A timely filing of a demand for trial shall result in a new trial before the court on all issues between the parties. (Emphasis added).

In *Poncek v. Poncek*, 121 Wis.2d 191, 192-93, 358 N.W.2d 539, 540-41 (Ct. App. 1984), the court held that a divorce judgment was not void on the basis that the wife had failed to serve the husband with a notice of appearance when the husband had actual knowledge of the hearing date. Relying on § 805.18(2), STATS., it concluded that the failure to serve the notice as required under § 767.125, STATS., was harmless error. *Id.* Similarly, because Engelbrecht received notice by personal delivery within the required time, failure to give this notice by mail is not fatal, but rather is harmless error.

Therefore, the order denying Simon's demand for a new trial is reversed and the matter is remanded to the trial court for further proceedings. The trial court is also directed to set aside the court commissioner's decision as a judgment since the demand for a new trial was timely filed and notice was timely given.

By the Court.—Order reversed and cause remanded for further proceedings.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.

